(13)

No. 91-810

In The

Supreme Court of the United States

October Term, 1991

CITY OF BURLINGTON,

Petitioner,

vs.

ERNEST DAGUE, SR., ERNEST DAGUE, JR., BETTY DAGUE, AND ROSE A. BESSETTE,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR RESPONDENTS

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STATEMENT OF THE CASE

It is undisputed in the record in this case that the market for legal services ordinarily compensates attorneys for the risk taken in contingent cases. This Court must decide whether, regardless of the operation of this market for legal services, the district court lacked authority to consider market treatment of risk in setting a reasonable attorney's fee.

Summary Of The Litigation On The Merits

Seven years ago, in April 1985, Respondents ("Dagues") hired their attorneys to represent them in a lawsuit concerning hazardous wastes dumped into Petitioner's ("City") municipal landfill ("Landfill"). Jt. App. I at 24. The Dagues' attorneys took this case on a contingency fee basis. They assumed the risk of receiving no attorneys' fees at all unless the Dagues prevailed in their lawsuit. Jt. App. at 24 and App. I at 132.

The Dagues own homes next to the Landfill. App. I at 89. Beginning in 1950, thousands of gallons of hazardous waste were dumped in the Landfill. App. I at 94-95. By 1985, methane gas in explosive concentrations was crossing the Landfill boundary onto the Dagues' property. App. I at 99, 102.

On the opposite side of the Landfill from the Dagues' property is a wetland called the Intervale. App. I at 89-90. As a result of tests conducted in 1980, the City learned that Landfill leachate contaminated with hazardous and toxic chemicals was being discharged into the Intervale directly below the Landfill. App. I at 92, 98.

On October 9, 1985, the Dagues filed suit to compel the City to comply with the Clean Water Act, 33 U.S.C. §§1251 *et seq.* ("CWA"), the Resource Conservation and Recovery Act, 42 U.S.C. §§6901 *et seq.* ("RCRA"), and state environmental laws. App. II at 244-69. After a vigorously contested and highly technical trial (App. I at 65-67, 77-81, 133), on October 16, 1989, the district court found that the City had violated the CWA and RCRA (App. I at 87-88), and ordered

the City to close its Landfill and pay the costs of litigation, including reasonable attorney and expert fees under 42 U.S.C. §6972(e) and 33 U.S.C. §1365(d). App. I at 88-89. The Second Circuit affirmed the district court "in all respects." App. I at 37.

Attorneys' Fee Award

In support of their Application for Award of Fees and Costs (Jt. App. I at 5-218), the Dagues filed a memorandum (Jt. App. I at 7-17), two affidavits by trial counsel (Jt. App. I at 17-32), a detailed bill itemizing work, hours, services and rates and expert fees and costs (Jt. App. I at 32-210), and three affidavits by experienced attorneys familiar with the legal marketplace. Jt. App. I at 211-218.

Attorneys William Pearson and Richard Bland provided the vast majority of legal services. Pearson's hourly rates ranged from $85.00 per hour to $125.00 per hour and Bland's ranged from $45.00 per hour to $80.00 per hour. The overall composite hourly rate charged in the Dagues' first fee petition was $64.35 per hour.

The affidavits of experienced counsel established that: (1) the hourly rates the Dagues' attorneys charged were the prevailing rates for hourly work in the Burlington marketplace (Jt. App. I at 212, 215, 217); (2) when contingency fee arrangements are made in the Burlington marketplace, a percentage of fee recovery is fixed at a level which would be larger than for work done on an hourly basis to reflect the risk of no recovery (Jt. App. I at 212, 215); (3) lawyers in the Burlington marketplace who take contingency work expect to receive a multiple of their usual hourly rate if they prevail (Jt. App. I at 217-18); and (4) without this expectation of an enhancement, there is no incentive to take this work (*Id.*).

The City opposed the Dagues' fee application claiming they did not substantially prevail. Jt. App. I at 219-29, 236-81. However, the City neither challenged the reasonableness of the hourly rates (Pet. Brief 6), nor did it counter any

of the Dagues' evidence regarding the operation of the marketplace for legal services. After a hearing, the district court awarded the Dagues a full attorneys' fee lodestar of $198,027.50, plus expenses of $10,929.66, together with a 25% attorneys' fee enhancement. App. I at 130-34. The Court justified the enhancement on the basis of its findings that "plaintiff's attorneys would not have been compensated at all unless plaintiffs prevailed" (App. I at 132), that "the risk of not prevailing was substantial under the facts here," and that "absent an opportunity for enhancement, plaintiff would have faced substantial difficulty in obtaining counsel of reasonable skill and competence in this complicated field of law." App. I at 132-33.

The Dagues requested a separate delay enhancement given the long history of the case without any fee payment. App. I at 13. The district court refused, deciding that the 25% enhancement was adequate in order to compensate for delay in payment as well as risk. App. I at 133. Therefore, the district court awarded a lodestar that was based only on historic rates without a separate adjustment for the delay in payment.

In affirming the lower court "in all respects," the Second Circuit expressly rejected the City's claim that the Dagues had not substantially prevailed "because, in large part, it was the pressure generated by the plaintiffs' efforts that caused the city to actually close the landfill [and o]nly by bringing this suit against the city were the plaintiffs finally able to get from the city action as opposed to mere promises." App. I at 30-31.

The Second Circuit also affirmed the lower court's lodestar award and the 25% risk enhancement. App. I at 35-37. In particular, the Court affirmed the finding that "without the possibility of fee enhancement . . . competent counsel might refuse to represent clients thereby denying them effective

access to the court." App. I at 37.[1] On June 26, 1991, the City filed a Petition for Rehearing and Suggestion for Rehearing *en banc*, which was denied on August 20, 1991. App. I at 145-46.

The City filed its Petition for a Writ of Certiorari on November 18, 1991. On January 27, 1992, this Court granted the Petition on the single question of whether courts have authority to consider the risk of nonpayment of any fees in a contingent case when determining a reasonable attorney's fee under the fee shifting provisions in the CWA and RCRA.

The Dagues' attorneys have provided legal services for seven years in a difficult case in a complicated field of law, carried the risk of not receiving any payment for their services, achieved a substantial result for their clients, charged an overall composite rate of $67.58 for their services, and

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[1] On June 25, 1991, following their success in the Second Circuit, the Dagues filed a Supplemental Application for Award of Fees and Costs in the District Court, and an Initial Application For Award of Fees and Costs Incurred on Appeal in the Second Circuit. The District Court Supplemental Application requested a $24,113.00 lodestar, a 25% fee enhancement and $2,707.61 in expenses. Jt. App. II at 311-55. The Second Circuit Application requested a $53,315.00 lodestar, a 25% enhancement and $2,240.00 in expenses. Jt. App. II at 356-417. Both applications were in substantially the same format as the original district court application, including affidavits from experienced attorneys in the legal marketplace. The City did not file any opposing memoranda or affidavits to either of the supplemental applications.

On October 11, 1991, the district court issued an Order granting supplemental attorneys' fees in the amount of $24,113.00, and expenses of $2,707.61, together with a 25% enhancement of the attorneys' fees. App. II at 137-38.

On October 25, 1991, the Second Circuit issued an Order granting the Dagues supplemental attorneys' fees in the amount of $24,113.00, and expenses of $2,707.61 but denied a 25% "risk enhancement" on the ground that the "risk" involved in defending an appeal is not significant. App. I at 38-39.

have not, as of yet, received *any* payment for their time or even reimbursement for their advancement of expert fees and costs.

SUMMARY OF ARGUMENT

In determining what are reasonable attorneys' fees under prevailing party statutes, this Court consistently has relied on the principles and practices of the legal marketplace. *Hensley v. Eckerhart*, 461 U.S. 414 (1983); *Blum v. Stenson*, 465 U.S. 886 (1984); *Missouri v. Jenkins*, 491 U.S. 274 (1989). This Court has repeatedly emphasized the congressional purpose behind fee-shifting statutes as providing incentives for competent private attorneys to enforce civil rights, environmental, and antitrust statutes. *Id.* In *Pennsylvania v. Delaware Valley Citizen's Council for Clean Air*, 483 U.S. 711 (1987) (*Delaware Valley II*), a majority of the Court held that legal marketplace conditions may require enhancement of the lodestar fee to account for the risk of loss in order to attract competent counsel to prosecute such cases. In *Department of Labor v. Triplett*, 494 U.S. 715 (1990), this Court recognized that an adjustment of an attorney's fee for the contingent risk of loss was permitted as part of a "reasonable attorney's fee." *See* Section I, *infra*.

The phrase "reasonable attorney's fee" meant to Congress what it meant in the antitrust and securities statutes that had been earlier enacted by Congress: that the risks of contingent representation may require additional compensation. If Congress intended to limit the courts' consideration of marketplace factors, it would have done so because "[i]t is . . . clear that when Congress meant to set a limit on fees, it knew how to do so." *Crawford Fitting Co. v. J.T. Gibbons*, 482 U.S. 437, 442 (1987). Congress made such a limitation in the Individuals with Disabilities in Education Act, 20 U.S.C. §1415(e)(4)(C) where "no bonus or multiplier may be used in calculating fees awarded under this subsection." Moreover, the limitation on marketplace factors sought by the City and *amici* was presented to Congress as proposed bills and amendments which were rejected. And, even if reference to legislative history is made, it demonstrates that it was Congress' intent, object and design to adopt marketplace standards for calculating fee awards. In relying on the phrase "prevailing party" to limit the use of marketplace

factors in fees calculation, *amici* confuse the statutes' entitlement standard with their fee calculation standard. That the phrase "prevailing party" speaks to a party's entitlement to fees has been repeatedly recognized in this Court's fees jurisprudence. *See* Section II, *infra*.

Nine circuits have accepted Justice O'Connor's two-prong market test and applied it correctly. Nearly all have done so without difficulty, often on uncontradicted records. An upward adjustment for risk is not automatic under the test; numerous courts have found no need for risk enhancement or that the evidence submitted did not support enhancement. Justice O'Connor's class-based assessment of risk has proven workable.

The City and *amici* do not dispute the marketplace basis of this Court's prior attorney's fees decisions, but simply reject the market's treatment of risk. Their selective rejection of market principles defies the legal marketplace, the statutory language, and well-established principles of market economics. The City and *amici's* proposed *per se* rule prohibiting *any* risk enhancement has no legal or economic basis. *See* Section III, *infra*.

Because the district court, on an undisputed record, correctly held that an enhancement was available to compensate for contingent risk, this Court should affirm the district court's award. *See* Section IV, *infra*.

ARGUMENT

I.

A REASONABLE FEE FOR A CASE PROSECUTED ON A CONTINGENT FEE BASIS MAY INCLUDE AN ADJUSTMENT FOR THE CONTINGENT RISK OF LOSS

A. This Court Consistently Has Accepted Legal Marketplace Principles In Determining What Are Reasonable Fees Under Fee-Shifting Statutes

This Court has consistently relied on legal marketplace principles and practices in determining what are reasonable

attorney's fees under fee-shifting statutes. In fact, in its fees jurisprudence, the Supreme Court has *only* relied on the marketplace to effectuate congressional intent and determine a "reasonable" fee.

In *Hensley v. Eckerhart*, the first case in which this Court provided guidelines for calculating a reasonable attorney's fee pursuant to a major fee-shifting statute, this Court adopted the twelve factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) as the foundation for calculating a reasonable fee. *Hensley v. Eckerhart*, 461 U.S. 414, 429-30 n.3 (1983). These twelve factors derive directly from the American Bar Association Code of Professional Responsibility, originally promulgated in 1908 and operative today, as the factors used in the legal marketplace to calculate reasonable attorney's fees. *See, e.g.*, E. Cavanagh, *Attorneys' Fees in Antitrust Litigation: Making the System Fairer*, 57 Fordham L. Rev. 51, 79 and n.199 (1988).

Moreover, *Hensley* applied the ABA factors with an eye to their use in the private marketplace:

> Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission.

Id. at 434. The Court then held that district courts must consider the reasonable number of hours, the reasonable hourly rate, and "also may consider other factors identified in *Johnson*, . . . " and noted that the inquiry does not end with the lodestar:

> There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the "results obtained."

Id. at n.9.

This Court again relied on the private market in *Blum v. Stenson*, 465 U.S. 886 (1984), which presented the question

of what is a reasonable hourly rate for attorney services under 42 U.S.C. §1988. Petitioner in *Blum* sought to have hourly rates set on a "cost-plus" basis. *Id.* at 892 n.6. The Solicitor General urged the Court to adopt a cost-related standard for non-profit legal services organizations. *Id.* at 892. A unanimous Court rejected these arguments and held that "[t]he statute and legislative history establish that 'reasonable fees' under §1988 are to be calculated according to the prevailing market rates in the relevant community. . . . " *Id.* at 894-95. These "prevailing market rates" are the rates that are "in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation."[2] *Id.* at 895 n.11.

In *City of Riverside v. Rivera*, 477 U.S. 561 (1986), the Court rejected a proposed rule that a reasonable fee be proportional to the money damages recovered and affirmed an award for all hours reasonably expended at prevailing market rates. Although the dissent considered the award excessive, it recognized that market principles apply to the award of statutory fees:

> The analysis of whether the extraordinary number of hours put in by respondents' attorneys in this case was "reasonable" must be made in light of both the traditional billing practices in the profession, and the fundamental principle that the award of a "reasonable" attorney's fee under §1988 means a fee that would have been deemed reasonable if billed to affluent plaintiffs by their own attorneys.

Id. at 591 (Rehnquist, J., dissenting).

The Court again adhered to legal marketplace principles in *Missouri v. Jenkins*, 491 U.S. 274 (1989). The issues there were whether: (1) an attorney's fee can be enhanced to

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[2] The *Blum* decision also reaffirmed the *Hensley* holding that the lodestar fee could be enhanced, but reversed the enhancement awarded by the district court for lack of supporting evidence. *Id.* at 901-02.

account for delay in receipt of payment, (2) the work of paralegals and law clerks is a compensable part of a reasonable attorney's fee, and, (3) if so, is compensation to be at prevailing market rates. In answering all these questions, the Court held that §1988 requires that market practices be followed:

> The statute specifies a "reasonable" fee for the attorney's work product. In determining how other elements of the attorney's fee are to be calculated, we have consistently looked at the marketplace as one guide to what is "reasonable."

Id. at 285-86.

On the issue of enhancement for delay, the majority stated, "[o]ur cases have repeatedly stressed that attorney's fees awarded under this statute are to be based on market rates for the services rendered" and held that compensation received years after the rendering of services is treated differently than compensation paid contemporaneously. *Id.* at 283.

On the paralegal/law clerk compensation issues, the Court held that paralegal and law clerk time is to be included in reasonable attorney's fees calculations and that market practices are to be followed in determining their amount:

> If an attorney's fee awarded under §1988 is to yield the same level of compensation that would be available from the market, the "increasingly widespread custom of separately billing for the services of paralegals and law students who serve as clerks" *Ramos v. Lamm*, 713 F.2d 546, 558 (10th Cir. 1983), must be taken into account. . . . Thus, if the prevailing practice in a given community were to bill paralegal time separately at market rates, fees awarded the attorney at market rates for attorney time would not be fully compensatory if the court refused to compensate hours billed by paralegals or did so only at "cost."

Id. at 286-87.

The Court held that §1988 only requires that market practices be followed, not that paralegals always be compensated separately at hourly rates:

> Nothing in §1988 requires that the work of paralegals invariably be billed separately. If it is the practice in the relevant market not to do so, or to bill the work of paralegals only at cost, that is all that §1988 requires.

Id. at 288. The Court rejected Petitioner's claim that this would lead to a "windfall" for attorneys, or to separate billing for secretarial services and office supplies:

> The answer to this question is, of course, that attorneys seeking fees under §1988 would have no basis for requesting separate compensation of such expenses unless this were the prevailing practice in the local community. *The safeguard against the billing at a profit of secretarial services and paper clips is the discipline of the market.*

Id. at 287, n.9 (emphasis added).[3]

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[3] This Court also has accepted and endorsed legal marketplace practices in *Blanchard v. Bergeron*, 489 U.S. 87 (1989), and *Venegas v. Mitchell*, 495 U.S. 82 (1990). Both cases concern the relationship of percentage-based contingent fee agreements and §1988. Although neither case holds that the contingent fee percentage *determines* the reasonable statutory fee, both hold that the statute was designed to incorporate and enhance the incentives for attorneys to prosecute civil rights cases, not limit or restrict market practices and incentives. In *Blanchard*, Justice White, writing for the majority, recognized that the purpose of §1988's fee provisions is "to encourage meritorious civil rights claims because of the benefits of such litigation for the named plaintiff and for society at large" and that using percentage-based fee agreements as a cap on fees "would create an artificial disincentive for an attorney who enters into a contingent fee agreement. . . . " 489 U.S. at 95-96. In *Venegas*, Justice White, writing for a unanimous Court, made clear that a fee award under §1988 (which had included a 2.0 upward adjustment) did not limit the

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In fact, in *Department of Labor v. Triplett*, 494 U.S. 715 (1990), the Court expressly recognized that the availability of counsel will relate directly to the level of compensation, and that in certain markets, additional compensation – or a risk premium – will and should be reflected in that level of compensation. In *Triplett*, Petitioner challenged the Department of Labor's rule under the Black Lung Benefits Act prohibiting attorneys from recovering payments from their clients, claiming that it would limit the availability of attorneys willing to take contingent cases. However, under the statute, successful litigants were entitled to an award of "reasonable attorney's fees," and the Department's own regulation permitted enhancement to "permit consideration of the attorney's risk of going unpaid." 494 U.S. at 726. Justice Scalia, in reasoning that was adopted by all nine Justices, held that the additional compensation for assuming the risk of nonpayment was consistent with market practices and the statutory provision of a "reasonable attorney's fee":

> the existence in this country of a thriving contingent-fee practice demonstrates that this risk can be compensated for – so it comes down once again to the level of compensation.

Id.

The Court has therefore consistently adopted marketplace principles in its fees jurisprudence. It has accepted that the congressional purpose behind fee-shifting statutes is to provide incentives for competent attorneys to enforce our nation's civil rights and environmental statutes, has embraced the principles and practices of the relevant legal marketplace,

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enforceability of a market-based contingent fee, despite the fact that the fee agreement resulted in a fee more than ten times respondent's normal hourly rate. Again, the Court made clear: the statutory fee provision was not intended to limit market incentives for competent counsel to prosecute civil rights actions. *Venegas*, 495 U.S. at 86-88.

and has accepted contingency risk as part of that market and a permissible component of a "reasonable attorney's fee."

B. Justice O'Connor's Analysis of the Contingent Adjustment in *Delaware Valley II* Is Consistent With This Court's Adherence To Market Principles

Following this long line of Supreme Court decisions adopting the market place analysis as the basis for determining a "reasonable attorney's fee," Justice O'Connor in *Delaware Valley II* ruled that an award of fees to a prevailing plaintiff may properly include an adjustment to compensate for the risk of loss if the relevant market reflects such an adjustment as to the class of litigation. 483 U.S. at 731-33. To avoid arbitrary and conflicting application of the contingency adjustment, Justice O'Connor stated that contingency cases must be treated *as a class*, fee applicants bear the burden of proving the degree to which the relevant market compensates for risk, and enhancements should not be granted on the basis of the particular risks of the case.

Justice White's plurality decision focuses on a different question. Rather than questioning whether a contingency adjustment may be *part of* a reasonable fee as determined by the market, the plurality asks whether the attorney may be awarded "separate compensation," 483 U.S. at 715, and whether Congress intended the risk of loss to be a basis for "increasing an otherwise reasonable fee." *Id.* at 723. The plurality opinion examines the difficulties in assessing a risk adjustment on a case-by-case basis and does not address whether the market can compensate for the risk of loss that is inherent in a class of litigation. The plurality, and indeed, all nine justices reject an individualized *post hoc* determination of the risks. 483 U.S. at 726-27, 731, 745.

The Dagues do not seek to overturn that judgment. Instead, they embrace Justice O'Connor's market-based analysis. By awarding a contingency enhancement based on the market treatment of a class of litigation, and awarding risk

adjustment only insofar as "necessary to bring the fee within the range that would attract competent counsel," (*Id.* at 733), Justice O'Connor's formulation avoids completely the difficult practical problems identified in Justice White's plurality opinion and the possibility of the award of a "windfall" fee. *See* Section III.D, *infra*.

II.

LEGISLATION PROVIDING FOR THE AWARD OF REASONABLE ATTORNEY'S FEES TO A PREVAILING PARTY INCORPORATES LEGAL MARKETPLACE FACTORS

A. The Language of the Statutes Demonstrate That Congress Did Not Intend to Depart from Its Historic Reliance on the Market Model

When Congress enacted the environmental statutes at issue here, the phrase "reasonable attorney's fees" for a prevailing party had a well-established legislative and judicial meaning, which incorporated marketplace factors such as contingent risk. Under the rules of statutory construction, those phrases must be interpreted as they were in the securities and antitrust statutes previously enacted by Congress: to permit a contingent risk adjustment in the appropriate case. Moreover, Congress has put the limitation sought by the City and *amici* in other statutes, but *not* in the statutes presented here. Had Congress intended to prohibit the courts from considering marketplace factors, it would have done so, as it has done in numerous other statutes.

Like many statutes enacted before them, the environmental statutes at issue herein provide for a "reasonable attorney's fee" to the prevailing party. *See* 33 U.S.C. §1365(d); 42 U.S.C. §6972(e). The City and *amici* postulate that Congress abandoned its oft-placed reliance on the legal marketplace as a means of defining the amount of a "reasonable" fee to a prevailing party. To the contrary, the established canons of statutory construction demonstrate that Congress

incorporated marketplace factors, such as adjustments for contingent risk, when it adopted the phrase "reasonable attorney's fee" for the prevailing party.

"[T]he purpose of a statute includes not only what it sets out to change, but what it resolves to leave alone." *West Virginia Univ. Hosp. v. Casey*, 111 S. Ct. 1138, 1147 (1991). And, where a statute "contains a phrase that is unambiguous – that has a clearly accepted meaning in both legislative and judicial practice" the duty of the Court is to enforce the statute according to its terms. *Id.*

The phrase "reasonable attorney's fee" for the prevailing party had a "clearly accepted meaning" at the time it was incorporated into the statutes at issue here – a meaning that unquestionably included marketplace factors and anticipated adjustments for contingent risk in the appropriate case. "Reasonable attorney's fee" for the prevailing party plainly meant to Congress what it had plainly meant in the marketplace: that the risks of contingent representation may require special compensation.

It is a fundamental rule of statutory construction that words or phrases in a provision that were used in other statutes pertaining to the same subject matter will be construed in the same sense. *Marks v. United States*, 161 U.S. 297, 302-03 (1896); 2A *Sutherland Statutory Construction*, §51.02 (5th ed. 1992). The phrase "reasonable attorney's fee" for a prevailing party occurs in a number of antitrust and securities statutes that were enacted prior to the environmental statutes at issue here.[4] This Court and Congress have stated that these various fee-shifting statutes are to be interpreted "*in pari materia*."[5]

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[4] The Clean Water Act was enacted in 1972, and Congress passed the Resource Conservation and Recovery Act in 1976. The Civil Rights Attorneys' Fees Awards Act, 42 U.S.C. §1988, which also provides for "reasonable attorney's fees," was also enacted in 1976.

[5] *See, e.g., Pennsylvania v. Delaware Valley Citizen's Council for Clean Air*, 478 U.S. 556, 559 (1986) (*Delaware Valley I*); *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987).

One of the earliest prevailing party statutes to use the phrase "reasonable attorney's fee" was the Clayton Act of 1914, 15 U.S.C. §15. That phrase also is in the Securities Act of 1933, 15 U.S.C. §77k(e), and the Securities Exchange Act of 1934, 15 U.S.C. §78i(e), r(a), and u(h)(7)(A). By the mid 1970s, when §1988 and the environmental statutes were enacted, the phrase "reasonable attorney's fee" repeatedly had been interpreted to include marketplace factors, such as the contingent nature of the case.[6]

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[6] *See, e.g., Cherner v. Transitron Electronic Corp.*, 221 F.Supp. 55, 61 (D.Mass. 1963), *modified on other grounds, Green v. Transitron Electronic Corp.*, 326 F.2d 492, 496-97 (1st Cir. 1964) (antitrust; contingency enhancement awarded because "[n]o one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success."); *Steinberg v. Hardy*, 93 F.Supp. 873 (D.Conn. 1950) (securities; contingency enhancement awarded, noting that "actions, even when well-founded, will seldom be brought unless counsel can be found" on a contingent basis and that "obviously a retainer on a contingent basis is distinctly less attractive" than a guaranteed hourly rate); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 471 (2nd Cir. 1974) (antitrust; risk enhancement available because "despite the most vigorous and competent of efforts, success [in litigation] is never guaranteed"); *Lindy Bros. Builders, Inc. v. American Radiator & Standard Corp.*, 487 F.2d 161, 168 (3rd Cir. 1973) (antitrust; lodestar may be increased to reflect contingent nature of case); *Blank v. Talley Indus., Inc.*, 390 F.Supp. 1, 5 (S.D.N.Y. 1975) (antitrust; $1.4 million fee based in part on contingent risk); *In re Coordinated Pretrial Proceedings, Etc.*, 410 F.Supp. 680, 91 (D. Minn. 1975) (antitrust; enhancements awarded to "take into consideration the contingent nature of this litigation"); *In re Gypsum Cases*, 386 F.Supp. 959, 67 (N.D. Cal. 1974), *aff'd*, 565 F.2d 1123 (9th Cir. 1977) (antitrust; enhancements awarded for contingent risk); *Colson v. Hilton Hotels Corp.*, 59 F.R.D. 324, 326 (N.D. Ill. 1973) (antitrust; court gave "great weight" to fact that contingent case "ought to yield a greater degree of compensation upon successful prosecution of the

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Legislative language is interpreted with the presumption that Congress had knowledge of the basic rules of statutory construction. *McNary v. Haitian Refugee Center, Inc.*, 111 S.Ct. 888, 898 (1991); *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368, 377-79 (1949). And legal terms in a statute, such as "reasonable attorney's fee" for a prevailing party, are presumed to have been used in their legal sense. *Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *Bradley v. United States*, 410 U.S. 605, 609 (1973).

Here, Congress was enacting the fee provisions against a legislative common law of remarkable consistency and continuity in which "reasonable attorney's fee" for a prevailing party incorporated the marketplace model and, in appropriate cases, the contingent risk enhancement. Since legislative language is interpreted with the assumption that the legislature was aware of existing statutes and judicial decisions, *United*

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action"); *McKittrick v. Gardner*, 378 F.2d 872, 875 (4th Cir. 1967) (social securities disability benefits; "the contingency of compensation is highly relevant in the appraisal" of reasonable attorney's fees within the 25% statutory maximum); *Angoff v. Goldfine*, 270 F.2d 185, 189 (1st Cir. 1959) (securities; remanding fee award and directing lower court to consider contingent risk); *Perlman v. Feldmann*, 160 F.Supp. 310 (D.Conn. 1958) (securities; giving "great weight" to contingent nature of case); *In re Detroit Int'l Bridge Co.*, 111 F.2d 235, 37 (6th Cir. 1940) (bankruptcy reorganization under securities laws which considers "whether the fee is absolute or contingent"). *See also, In re Osofsky*, 50 F.2d 925, 27 (1931) (bankruptcy action; contingency enhancement awarded because "however much ingenuity and time attorneys may expend, they may not be able to get anything for the estate by their efforts."); F.B. MacKinnon, Contingent Fees For Legal Services: A Report of the American Bar Foundation 26 (1964) ("As we have seen in civil suits for damages under antitrust legislation the claimant is awarded reasonable attorney's fees if the suit is successful . . . The contingent factors, among others, is recognized by the courts in making the award.").

States v. Monia, 317 U.S. 424, 427-30 (1943); *F.C.C. v. American Broadcasting Co., Inc.*, 347 U.S. 284, 297 (1954), Congress' use of the phrase "reasonable attorney's fee" for a prevailing party must be interpreted to include the availability of a contingent risk enhancement.

If Congress meant to abandon its historic understanding of the phrase "reasonable attorney's fee" for a prevailing party, it would have used different words when it legislated the statutes at issue here. As noted by Justice Thomas in *United States v. Wilson*, 60 U.S.L.W. 4244 (1992), it is a "familiar maxim that, when Congress alters the words of a statute, it must intend to change the statute's meaning" (cit. omitted). By parity of reasoning, when Congress does not alter statutory language, its intent is to retain the familiar and accepted meaning. *See West Virginia Univ. Hosp. v. Casey*, 111 S.Ct. 1138, 1147 (1991); 2A *Sutherland Statutory Construction*, §45.12 (5th ed. 1992). Here, Congress did not alter the words of the fee provision because it did not intend to change the well established meaning of "reasonable attorney's fee."

Thus, in *West Virginia University Hosp. v. Casey*, this Court examined congressional changes to the phrase "reasonable attorney's fee" for a prevailing party in a variety of statutes. A comparison of the statutes was proper because statutes are construed "to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law." 111 S.Ct. at 1148. Because a number of statutes contained an express grant to a prevailing party of reasonable attorney's fees *plus expert witness fees*, the Court held that the statutory usage indicated that expert fees were an item "*in addition to* attorney's fees." *Id.* at 1142 (emphasis in original). The Court reasoned that Congress would not have engaged in "an inexplicable exercise in redundancy" by changing the language in some statutes. *Id.* at 1143.

The same comparison of congressional changes to the phrase "reasonable attorney's fee" for a prevailing party demonstrates that it is proper for courts to consider the marketplace factor of contingent risk, unless otherwise directed by Congress. When Congress enacted the Individuals with Disabilities in Education Act ("IDEA") in 1986, it specifically prohibited all bonuses or multipliers. In order to alter the usual meaning of the phrase "reasonable attorneys' fee" for a prevailing party, Congress specifically stated that "[n]o bonus or multiplier may be used in calculating the fees awarded under this subsection." 20 U.S.C. §1415(e)(4)(C). Similarly, when Congress passed the Antitrust Civil Process Act Amendments of 1976, the legislators focused considerable attention on the availability of contingent recoveries for private attorneys. As a consequence, both the House and Senate ultimately agreed explicitly to prohibit private attorneys from collecting contingency fees unless the award is determined by a court. 15 U.S.C. §15g(1)(A)-(B).

Thus, had Congress intended to limit the courts' discretion when they calculate a prevailing party's reasonable attorney's fee, it would have imposed express limitations, as it has done in numerous other statutes.[7]

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[7] Slightly more than one-fifth of the fee provisions in the United States Code regulate or limit the prevailing party's attorney's fee in certain types of cases. *See generally* 1 M. Derfner and A. Wolf, *Court Awarded Attorney Fees*, §504 (1991); *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) (upholding 38 U.S.C. §3404(c), which limits to $10 the fee that may be paid an attorney or agent who represents a veteran); 28 U.S.C. §2412(d)(1)(A) (fee awards under the Equal Access to Justice Act "shall be based upon prevailing market rates . . . except that . . . attorney fees shall not be awarded in excess of $75 per hour . . .); 42 U.S.C. §300aa-15(b) (fee awards under the National Vaccine Injury Compensation Act of 1986 limited to $30,000); 28 U.S.C. §2678 (fees under Federal Tort Claims Act limited to 20% of administrative settlement; 25% of judgment or settlement); 42 U.S.C.

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In contrast to the limitations in myriad fees provisions in the United States Code, Congress included no such wording in the environmental and civil rights statutes. In the same year that Congress enacted the IDEA, 1986, Congress amended the Superfund law (CERCLA), 42 U.S.C. §§9601 *et seq.* to add a citizens' suit provision, which provided for "reasonable attorney's fees," 42 U.S.C. §9659(f), yet did *not* include the restrictive language found in the IDEA. The "reasonable attorney's fees" provision in CERCLA is identical to that found in the CWA and RCRA. As Chief Justice Rehnquist aptly observed in *Crawford Fitting Co.*, 482 U.S. at 442, "[i]t is . . . clear that when Congress meant to set a limit on fees, it knew how to do so." The City seeks to have this Court disregard Congress' selective use of limiting language in other fees statutes. That result is impermissible, because such an interpretation would render Congress' words "an inexplicable exercise in redundancy." *West Virginia Univ. Hosp.*, 111 S.Ct. at 1143.

Congress not only knows how to limit fee enhancements, but it has also rejected proposed legislation that attempted to do so. In 1982, Senator Hatch unsuccessfully proposed an amendment to §1988 which would have prohibited "awards based on contingency factors or multipliers." S. 585, 97th Cong. 2d Sess. §722A(e) (1982). *See Attorney's Fees Awards: Hearings on S. 585 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 13 (1982). In addition, four bills were introduced which would have capped attorney hourly rates levied against government defendants at $75, and eliminated multipliers and bonuses under all federal prevailing party fee provisions. None of

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406(b)(1) (fees under Social Security Act limited to 25% of award); 22 U.S.C. §277d-21 (fees under American-Mexican Chamizal Convention Act of 1964 limited to 10%); 48 U.S.C. §1424c(f) (fees for claims regarding land under Organic Act of Guam limited to 5%); 50 U.S.C. App. §1985 (fees under Japanese-American Evacuation Claims Act of 1948 limited to 10%).

these bills passed.[8] *See* S. 2802, 98th Cong., 2d Sess. (1984); H.R. 5757, 98th Cong. 2d Sess. (1984); S. 1580, 99th Cong. 1st Sess. (1985); and H.R. 3181, 99th Cong. 1st Sess. (1985). As recently as last year, an amendment was proposed as part of the Civil Rights Act of 1991, which would have limited a prevailing party's attorney's fees to 20% of the total award. 137 Cong. Rec. S. 15338-39 (daily ed. Oct. 29, 1991).

The rejection of an amendment indicates that the legislature does not intend the law to include the provision embodied in the rejected amendment. *Lapina v. Williams*, 232 U.S. 78 (1914); *United States v. Great N. R.R. Co.*, 287 U.S. 144, 155 (1932). Thus, the numerous failed attempts to limit the availability of enhancements in the environmental and civil rights area demonstrate that a contingent risk enhancement may be available in appropriate cases.[9]

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[8] In advocating on behalf of the failed bills, the Department of Justice raised many of the same arguments it raises here. *See The Legal Fee Equity Act [S.2802]: Hearing Before the Subcomm. on the Constitution of the Senate Judiciary Committee*, 98th Cong., 2d. Sess., 38-41 (1984) (comments and materials submitted by Deputy Attorney General Carol Dinkins that a prohibition against multipliers is required because multipliers subsidize losing cases, create needless litigation, and are difficult for the courts to administer); *Legal Fees Equity Act [S.1580]: Hearing Before the Subcomm. on the Constitution of the Senate Judiciary Committee*, 99th Cong. 1st Sess. 47-51 (1985) (comments and materials submitted by Deputy Attorney General Lowell Jensen making same arguments).

[9] This is, moreover, consistent with *Crawford Fitting Co.*, 482 U.S. 437 and *West Virginia Univ. Hosp.*, 111 S.Ct. 1138, where the Court was examining the civil rights and antitrust fees provisions as well as a separate specific statute that governed the topic of expert fees, 28 U.S.C. §1821. The Court described 28 U.S.C. §1821 as a statute which "comprehensively regulated" the kinds of expenses "that a federal court may tax as costs against the losing party." *Crawford Fitting*, 482 U.S. at 440. Applying the well-settled rule that a specific statute will control over a

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Under standard rules of statutory construction, the language of the statutes cannot be interpreted to embody any limit on use of the marketplace factor of contingent risk in an appropriate case. Congress has imposed the limitation sought by the City and *amici*, but not in the statutes at issue here. The City cannot now impute such limitation in the absence of clear congressional intent.

B. The Legislative History Adopts Marketplace Standards For Calculating a "Reasonable Fee"

The legislative history readily demonstrates that Congress adopted marketplace standards for determining a reasonable fee. In enacting §1988, Congress cautioned that "[u]nless the judicial remedy is full and complete, it will remain a meaningless right." H.R. Rep. No. 1558, 94th Cong., 2d Sess. 1 (1976) ("H.R. Rep."). In light of this goal, Congress gave ample instruction to the courts on how to calculate a "reasonable attorney's fee," repeatedly pointing to a market consideration of the contingent nature of a case.

First, "Congress directed that attorney's fees be calculated according to standards currently in use under other fee-shifting statutes." *Blum v. Stenson*, 465 U.S. at 893. As the Court noted, *Blanchard v. Bergeron*, 489 U.S. at 95, Congress "clearly" instructed the courts to treat fee calculations in the same manner as other complex federal litigation fee petitions:

> It is intended that the amount of fees awarded under [§1988] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases.

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general one, the Court held that the provisions of 28 U.S.C. §1821 limited expert fees to $30 per day unless the statutory language indicated otherwise. Here, there is no specific statute such as 28 U.S.C. §1821 and, more importantly, attempts to pass such a specific statute limiting fees have been expressly rejected by the Congress.

S. Rep. No. 1011, 94th Cong., 2d Sess. 6 (1976) ("S. Rep."). *See also* H.R. Rep. at 8-9 (referring to antitrust cases and noting that "civil rights plaintiffs should not be singled out for different and less favorable treatment.").

In fact, Congress made repeated reference to the backdrop of established judicial standards that incorporated market concepts, and it directed courts to follow those standards. Thus, Congress "intend[ed] that, at a minimum, existing judicial standards . . . should guide the courts." H.R. Rep. at 8. Describing the "reasonable attorney's fees" provision as a "key feature," Congress commented that "[b]ecause other statutes follow this approach, the courts are familiar with these terms and in fact have reviewed, examined, and interpreted them at some length." H.R. Rep. at 6.

As noted above, for years prior to the passage of the CWA and RCRA, courts had routinely awarded fee enhancements where appropriate under similar fee-shifting statutes to account for contingent risk in various types of complex litigation. *See* cases cited in IIA, *supra*. Thus, the "existing judicial standards" which Congress intended to govern determinations of a reasonable attorney's fee, and which the courts had already "reviewed, examined and interpreted at some length," included adjustments for the risk premium.

Congress then instructed the courts that "[i]n computing the fee, counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, 'for all time reasonably expended on a matter.' " S. Rep. at 6 [citations omitted]. It was, and is, traditional for attorneys to receive a higher rate of compensation from contingent fee-paying clients. As *amici* admit, "[f]ree legal services confer a substantial benefit on a client. In exchange for that benefit, it is *reasonable* for the attorney to charge a fee to the client, if the case is won, that is greater than the fee [an hourly fee-

paying] client would be charged for the time expended." Brief of District of Columbia at 11 [emphasis added].[10]

Similarly, it is "traditional" for the risk premium for contingent cases to be calculated separately, rather than to be subsumed in the lodestar. *See, e.g.*, Declaration of Chester Kamin at ¶7; Declaration of Chesterfield Smith at ¶10; Declaration of Steven Mayer at ¶8; Declaration of Robert Weinberg at ¶3. *See* Materials lodged by Respondents.

Finally, Congress cited several cases as guideposts for courts to use in determining a reasonable fee. Both the House and Senate reports cite *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), which grafted the long-standing legal market factors "consistent with those recommended by the American Bar Association's Code of

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[10] Courts also have recognized the legal market truism that, in contrast to cases taken with the expectation of a guaranteed hourly fee, contingent cases can, in some cases, compel a risk premium. *See Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 168 (3d Cir. 1973) (no one expects a lawyer who works on a contingent fee to charge as little as he would charge an hourly fee client); *see also Jones v. Diamond*, 636 F.2d 1364, 1382 (5th Cir.) (*en banc*), *cert. dismissed*, 453 U.S. 950 (1981) ("Lawyers who are to be compensated only in the event of victory expect and are entitled to be paid more when successful than those who are assured of compensation regardless of result"); *Stanford Daily v. Zurcher*, 64 F.R.D. 680, 685 (N.D. Cal. 1974), *aff'd*, 550 F.2d 464 (9th Cir. 1977), *rev'd*, 436 U.S. 547 (1978) ("the American Bar Association [has determined] that attorneys deserve higher compensation for contingent than for fixed fee work").

Congress expressly approved the *Lindy* case when it enacted the fee-shifting provisions of the Toxic Substances Control Act, ("TSCA") 15 U.S.C. §§2618(d), 2619(c)(2), and 2620(b)(4)(C). Like the statutes at issue here, all three of TSCA's provisions allow a court to award "reasonable fees for attorneys." The legislative history cites *Lindy* as illustrative of the fact that the amount of a fee award "can be adjusted for factors including, *inter alia*, the contingent nature of the success." *See* House Committee On Interstate and Foreign Commerce, 94th Cong., 2d Sess., Legislative History of the Toxic Substances Control Act 255-56 (Comm. Print 1976).

Professional Responsibility" onto the process of setting a reasonable fee under Title VII's fee-shifting provision. *Id.* at 719. *See* S. Rep. at 6; H.R. Rep. at 8. These twelve ABA factors include consideration of "whether the fee is fixed or contingent."[11] As recognized by Justice White, "[i]n many past cases considering the award of attorney's fees under §1988, we have turned our attention to [*Johnson*]," and the *Johnson* contingency fee factor is "a factor" which "may aid in determining reasonableness." *Blanchard*, 489 U.S. at 93. *See, supra*, at note 3.

In addition to adopting *Johnson*, Congress pointed to three cases where the fee standards were "correctly applied." *Blanchard*, 489 U.S. 87, (examining cases cited in legislative history to determine Congressional intent). S. Rep. at 6. These three cases are *Stanford Daily*, 64 F.R.D. 680; *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 66 F.R.D. 483 (W.D.N.C. 1975); and *Davis v. County of Los Angeles*, 8 Empl. Prac. Dec. ¶ 9444 (C.D. Cal. 1974).

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[11] The City and *amici* concede that this factor is applicable to a fee calculation, but attempt to limit its import by saying that the factor only focuses on the existence of any contract for fees between the attorney and client. This distinction is without significance. A court must look at whether or not the attorney accepted the case on a contingent basis, because "when the plaintiff has agreed to pay its attorney, win or lose, the attorney has not assumed the risk of nonpayment and there is no occasion to adjust the lodestar fee because the case was a risky one." *Delaware Valley II*, 483 U.S. at 716.

Similarly, the plurality in *Delaware Valley II* recognizes that the factor "suggests that the nature of the fee contract between the client and his attorney should be taken into account when determining a reasonable fee," 483 U.S. at 723, but fails to conclude that a higher fee award might be warranted when the nature of the fee contract involves the risk of no recovery. There can be no question that, when Canon 13 of the ABA Canons of Professional Ethics was promulgated in 1908 and amended in 1933, it provided that risk of loss may be a factor in determining the reasonable fee: "A contract for a contingent fee, where sanctioned by law, should be reasonable under all the circumstances of the case, including the risk and uncertainty of the compensation,. . . . "

In approving these cases, Congress embraced a definition of "reasonable attorney's fee" that permits upward adjustments for factors such as contingent risk. In *Stanford Daily*, the court first found 750 hours expended by plaintiffs reasonable and compensable. 64 F.R.D. at 683. Next, the court allowed market-based "fixed-fee" hourly rates averaging $50 per hour, which defendants conceded were reasonable. *Id.* at 684-85. Finally, the court examined the fact that counsel prosecuted the case on a contingent basis, and adjusted the lodestar upward by approximately 27% to provide "full and fair compensation":

> Federal court decisions generally reason that the amount of any award of attorneys' fees should reflect any contingencies which stood between the attorneys and their deserved fee [citations omitted]. These decisions parallel the American Bar Association's determination that attorneys deserve higher compensation for contingent than for fixed-fee work . . .
>
> Federal courts' failure to make contingency calculations in determining fees awards, in contrast, would discourage many attorneys from accepting pro bono publico cases by presenting them with the financially unacceptable "risk of wasting hours of work, overhead and expenses". . . .

64 F.R.D. at 685 (citation omitted).

Similarly, in *Swann*, 64 F.R.D. at 484-86, the court held that a "[p]ertinent factor[] in fixing fees" includes whether the fee is "fixed or contingent." Finally, the *Davis* court acknowledged there may sometimes be a need for upward adjustment of the lodestar, 8 Empl. Prac. Dec. ¶ 9444 at 5048, and recognized that the district court's "first hand observations" are important in determining a reasonable fee. *Id.* at 5049 (citation omitted).

None of the cases Congress highlighted supports the kind of marketplace intervention the City and *amici* advance. None

of the cases suggests that an upward adjustment of the lodestar for factors such as contingent risk is prohibited. The legislative history is devoid of such market restraints. In fact, as this Court has noted, "Petitioner's argument that the use of market rates violates congressional intent . . . is flatly contradicted by the legislative history of §1988." *Blum*, 465 U.S. at 894.

To the contrary, Congress explicitly has recognized that reasonable attorney's fee awards under §1988 may include upward enhancements. As noted previously, the fee-shifting provision of the IDEA expressly prohibits the use of a "bonus or multiplier" in calculating "reasonable attorney's fees." 20 U.S.C. §1415(e)(4)(B) & (C). In the Joint Conference Report, *reprinted in* 1986 U.S. Code Cong. & Ad. News 1807, 1808, the House and Senate Conferees noted that by prohibiting upward enhancements in the IDEA, Congress did "not intend in any way to diminish the applicability of interpretation by the U.S. Supreme Court regarding bonuses and multipliers to other statutes such as 42 U.S.C. §1988."

C. Recognition of the Risk Premium Is Consistent With The Design, Object and Policy of the Statutes

In determining the meaning of a statute, the Courts look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987). As stated above, Congress' design in enacting these statutes was to follow the market model, and Congress' object and policy was to provide citizens with meaningful access to the courts to vindicate their rights. Failure to recognize and account for contingent risk in determining "reasonable attorneys' fees" would therefore contravene Congress' express design, object and policy.

Congress made findings that a fee structure regulated by marketplace factors was necessary to accomplish its purposes in the civil rights and environmental statutes. As the court

recognized in *Delaware Valley I*, " '[t]he effective enforcement of Federal civil rights statutes depends largely on the efforts of private citizens,' and unless reasonable attorney's fees could be awarded for bringing these actions, Congress found that many legitimate claims would not be redressed." 478 U.S. at 560, *citing* H.R. Rep. at 1.[12] "The purpose of §1988 is to ensure effective access to the judicial process." *Hensley*, 461 U.S. at 429. These factual findings[13]

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[12] The legislative history of §1988 echoes these objectives again and again: *See* S. Rep at 6 ("[§1988] provides the fee awards which are necessary if citizens are to be able to effectively secure compliance with these existing [civil rights] statutes); S. Rep. at 2 ("civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain"); S. Rep. at 5 ("[i]n several hearing held over a period of years, the Committee has found that fee awards are essential if the Federal statutes to which [§1988] applies are to be fully enforced"); and S. Rep. at 6 ("[i]f our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases.")

The legislative history also repeats the concern that poor people in particular have meaningful access to the courts to assert their rights: *See, e.g.*, S. Rep. at 2 ("[i]n many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer"); H.R. Rep. at 1 ("[b]ecause a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts"); H.R. Rep. at 3 ("private lawyers were refusing to take certain types of civil rights cases because the civil rights bar, already short of resources, could not afford to do so.").

[13] Congress made these findings based on many days of extensive testimony. *See The Effect of Legal Fees on the Adequacy of Representation: Hearings Before the Subcomm. on Rep. of Citizen Interests of the Senate Judiciary Committee*, 93d Cong., 1st Sess. (1973) and *Awarding of Attorneys' Fees: Hearings Before the Subcomm. on Courts, Civ. Liberties, and the Admin. of Justice of the House Judiciary Committee*, 94th Cong., 1st Sess. (1975).

made by Congress are entitled to "a great deal of deference." *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. at 330 n.12 (1985).

The *Delaware Valley II* plurality postulated that "[i]t may be that without the promise of risk enhancement some lawyers will decline to take cases; but we doubt that the bar in general will so often be unable to respond. . . . " 483 U.S. at 727. However, Congress found otherwise and, in any event, has relied upon the application of the market in order to *assure* that the bar does respond. *See* Sections IIA and B, *supra*. In particular, Congress wanted to assure that the bar responded to victims of violations of environmental and civil rights statutes because, unlike personal injury cases, these litigants "seek[] to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms." *Blanchard*, 489 U.S. at 96.

Similarly, Congress enacted the CWA's fee-shifting provision, 33 U.S.C. §1365(d), because "it is important to provide that citizens can seek [court enforcement]," and noted that "in bringing legitimate actions under this section citizens would be performing a public service and in such instances, the courts should award costs of litigation to such party." S. Rep. No. 414, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S. Code Cong. & Ad. News 3668 at 3746-47.[14]

Congress has "instructed the courts to use the broadest and most effective remedies available to adhere to [these] goals," S. Rep. at 3, and "the fee-shifting provision [is] 'an integral part of the remedies necessary to obtain' compliance with our statutory policies." *Evans v. Jeff. D.*, 475 U.S. 717, 731 (1986). In *Stanford Daily*, 64 F.R.D. 680, the court noted that accounting for contingent risk in setting a reasonable fee

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[14] Congress enacted the fee-shifting provision of RCRA "[drawing] on the similar provisions of the Clean Air Act of 1970 and the [Clean Water Act]." *Delaware Valley I* also noted "the purposes behind both §304(d) [of the Clean Air Act] and §1988 are nearly identical." 478 U.S. at 559.

serves Congress' purpose of providing meaningful and effective access to the courts:

> [Contingent adjustments] help[] attract counsel to the enforcement of important constitutional principles and significant congressional policies which might otherwise go unrepresented. . . . From the public's standpoint, the contingent fee helps equalize the access of rich, middle-class, and poor individuals to the courts by making attorney decisions concerning representation turn on an action's merits rather than on the size of a client's income.

64 F.R.D. at 685.

A "reasonable attorney's fee" must account for contingent risk if Congress' object of providing meaningful and effective access is to be met. As one commentator stated, "the experience of the marketplace indicates that lawyers generally will not provide legal representation on a contingent basis unless they receive a premium for taking that risk." S. Berger, *Court Awarded Attorneys' Fees: What Is "Reasonable"?*, 126 U.Pa.L.Rev. 281, 324-25 (1977). *See also Legal Fees Equity Act [S.1580]: Hearings Before the Subcomm. on the Constitution of the Senate Judiciary Committee*, 99th Cong., 1st Sess. 289 (1985), Testimony of Philip Sunderland ("without market-rate compensation and without the possibility of having contingent representation, it is not only economically infeasible [to take on cases], . . . it is economic suicide").

In sum, interpreting the statutory language to allow for contingent adjustments is "reasonable, consistent, and faithful to [the statute's] apparent purpose." *Blanchard*, 489 U.S. at 100 (Scalia, J., concurring). Failure to adhere to market

principles in determining a reasonable fee will result in a failure to follow Congress' design, object and policy.[15]

D. Risk Adjustments Do Not Compensate Non-Prevailing Parties

The Solicitor General contends that including a contingency adjustment in a "reasonable" fee is contrary to the statute, because an adjustment would compensate non-prevailing parties. The Solicitor General has provided no legislative history in support of this interpretation and, as discussed *supra* in Section II, Congress enacted the CWA and RCRA prevailing party fee provisions in view of many other prevailing party fee statutes, pursuant to which contingency adjustments had long been made.

In relying on the phrase "prevailing party" to limit the calculation of fees, *amici* confuse two separate inquires. The prevailing party inquiry defines the types of parties entitled to

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[15] The Solicitor General argues that because the fee-shifting statute constitutes a limited waiver of sovereign immunity, the statute must be construed narrowly. Solicitor General's Brief at 26, n. 24. This issue was raised in the City's Petition for Certiorari, and was not accepted. Moreover, as this Court has held, "[t]he question is what Congress intended – not whether it manifested the clear affirmative intent . . . to waive the sovereign's immunity." *Missouri v. Jenkins*, 491 U.S. 274, 282 (1989); *Franchise Tax Board v. United States Postal Service*, 467 U.S. 512, 521 (1984) ("waiver of sovereign immunity is accomplished not by a 'ritualistic formula;' " and "can only be ascertained by reference to underlying congressional policy."). Congress explicitly included government defendants in the CWA and RCRA. *See* 33 U.S.C. §1362(5); 42 U.S.C. §6903(15). Similarly, Congress intended §1988 to apply equally to government and nongovernment defendants: "With respect to the awarding of fees to prevailing defendants, it should further be noted that governmental officials are frequently the defendants in cases brought under statutes covered by [§1988]." H.R. Rep. at 7. *See also* S. Rep. at 5. Indeed, Congress has rejected bills which would have limited governmental exposure in fee-shifting statutes in the manner the Solicitor General suggests. *See* pp. 19-20, *supra*.

a fee award, while the reasonable fee inquiry defines the proper calculation of the fee award.

This Court defined the term "prevailing party" in *Texas State Teachers' Assn. v. Garland Indep. School Dist.*, 489 U.S. 782 (1989). Writing for a unanimous Court, Justice O'Connor defined "prevailing party" as an entitlement, rather than a fee calculation term:

> Where . . . a change [in the legal relationship of the parties] has occurred, the degree of the plaintiff's overall success goes to the reasonableness of the award under *Hensley*, not to the availability of a fee award *vel non*.

Id. at 793. The distinction between the entitlement and calculation standards was also noted by the Court in *Hensley*, 461 U.S. 424.

> [The prevailing party standard] is a generous formulation that brings the plaintiff only across the statutory threshold. It remains for the district court to determine what fee is 'reasonable'.

461 U.S. at 433.[16]

Where Congress has limited the calculation of the *amount* of fees, it has left the prevailing party standard intact. For example, although the IDEA prohibits risk enhancements, fees are awarded "to the parents or guardian of a

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[16] The legislative history confirms that the phrase "prevailing party" speaks to entitlement to, and not calculation of, a "reasonable attorney's fee." Both the House and Senate Reports cite *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) for the proposition that "a prevailing plaintiff 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.' " H.R. Rep. at 6; S. Rep. at 5. In fact, the House Report contains a separate section entitled "Prevailing Party," which discusses at length the issue of whether and when a successful litigant is a prevailing party under the statute. The House Report contains a wholly separate section entitled "Reasonable Fees." H.R. Rep. at 8-9.

child or youth with a disability who is the prevailing party." 20 U.S.C. 1415(e)(4)(B). If, as the *amici* argue, the phrase "prevailing party" prohibits risk adjustments, then Congress' limiting language is rendered an "inexplicable exercise in redundancy." *West Virginia Univ. Hosp.*, 111 S.Ct. at 1143. As discussed *supra* at pp. 18-19, Congress used the limiting language of the IDEA and other "prevailing party" statutes when it intended to alter the usual meaning of the fee provision.[17]

Even more simply, only prevailing parties receive payment. The Dagues are prevailing parties. In fact, there is nothing in the record to suggest that the Dagues, or any of their attorneys, have ever lost a case under a federal fee-shifting statute or that they ever will.[18] What Respondents and their attorneys seek in this case is market-based compensation for the risk they took in prosecuting *this case* on a contingent-fee basis, not the risk undertaken in some other case. The legal marketplace compensates for this risk *regardless* of whether an attorney has ever previously litigated a case on a contingent-fee basis or will ever in the future, or whether the attorney has won ten contingent-fee cases in a row or lost ten in a row. Under Justice O'Connor's test, the risk premium is analyzed on a relevant market basis and applies only if necessary to attract competent counsel to such cases, not to pay any non-prevailing party.

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[17] *Amici* argue that the term "prevailing party" operates as a limitation on reasonable fees. To the contrary, this Court has held that Congress' choice of that phrase was intended to broaden, not limit, the availability of fees so that both plaintiffs and defendants could be entitled to fees. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 415-16 (1978). *See also* H.R. Rep. at 6 (under the term "prevailing party," "either a prevailing plaintiff or prevailing defendant is eligible to receive an award of fees. Congress has not always been that generous.")

[18] If Messrs. Pearson and Bland had ever lost a case brought pursuant to a federal fee-shifting statute, the "*parties*" in that case would have received nothing from the fee award in this case.

Moreover, in a private contingent fee situation, an attorney cannot charge one client for the work performed in another case for another client.[19] If the acceptance of a contingency enhancement in private litigation was for the purpose of paying for other failed litigation efforts, contingency fee arrangements would be unethical, if not illegal. Nevertheless, contingency fee arrangements have long been accepted as legal and ethical, *see* ABA Model Code if Professional Responsibility, EC 2-20 and DR 2-106(b)(8); ABA Model Rules of Professional Conduct 1.5(c) (1983), and indeed have been approved by this Court in *Venegas v. Mitchall*, 495 U.S. 82 (1990), and *Blanchard v. Bergeron*, 489 U.S. 87 (1989). Thus, modern jurisprudence recognizes that the contingency enhancement compensates for the risk of loss in *that* case, not actual or potential loss in other cases.[20]

Lastly, although the Solicitor General today argues that a risk adjustment is inconsistent with the "prevailing party" language of the statute, that has not always been the interpretation of the United States. In *Blum v. Stenson*, the Solicitor General, in contending that a public interest attorney was not entitled to a risk adjustment to the lodestar fee, made the following concession:

> Ordinarily, when a lawyer engaged in private practice agrees to represent a client on such terms he may have to forego fee-generating employment.

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[19] An attorney is prohibited from receiving a fee from someone other than the client, unless the client has knowledge and consent of the arrangement. *See* ABA Model Code of Professional Responsibility DR 5-107(A); Model Rules of Professional Conduct, Rule 1.8(f) (1983).

[20] *Amicus* District of Columbia cites *Independent Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754 (1989), for the proposition that fees cannot be assessed against intervenors, and seeks to extend *Zipes* to mean that contingency adjustments assess fees against parties not determined to be non-prevailing. The *Zipes* decision cannot be tortured in this fashion. In *Zipes*, the intervenors were not determined to be wrongdoers and plaintiffs did not prevail against them. Here, fees have been assessed only against the non-prevailing party in favor of the prevailing party.

Some adjustment in the hourly rate of compensation to reflect the greater risk of nonpayment as compared to the private attorney's normal practice may be reasonable in such cases.[15]

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[15]The normal hourly rates charged by counsel engaged in private practice reflect the fact that the client is expected to pay the fee regardless of the outcome of the case. *If recovery of fees depends on the client's success, it may be necessary to allow a slightly higher hourly rate to induce lawyers engaged in private practice to undertake cases covered by Section 1988.*

Solicitor General's Brief at 21, *Blum v. Stenson*, 465 U.S. 886 (1984) (No. 81-1374) (emphases added). This interpretation of a comparable prevailing party statute is simply incompatible with the Solicitor General's current interpretation that a "prevailing party" statute may *never* permit an adjustment of the lodestar hourly rate to reflect the risk of loss.

III.

THE TEST SET FORTH BY JUSTICE O'CONNOR IN *DELAWARE VALLEY II* IS CONSISTENT WITH MARKET PRINCIPLES AND HAS PROVEN WORKABLE

A. Nearly All Courts Have Applied Justice O'Connor's Concurrence Correctly

The Solicitor General correctly notes that nine circuits have followed and applied the market-based test set forth in Justice O'Connor's *Delaware Valley II* concurring opinion.[21] Solicitor General's Brief at 11-12, n. 11. Nearly all courts have not only applied Justice O'Connor's concurrence, but also applied it correctly. Most courts following *Delaware*

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[21] The non-conforming circuits are the Second Circuit, in this case, and the District of Columbia Circuit in *King v. Palmer*, 950 F.2d 771 (D.C. Cir. 1991).

Valley II have relied on testimony of attorneys practicing in the relevant legal market to establish, or dispute, the dearth of counsel and market treatment of risk. In most cases, this testimony was uncontradicted, fact-finding was simple and straight-forward, and an adjustment was made. In other cases, evidence supporting a risk enhancement was found to be insufficient to meet the *Delaware Valley II* test, or was sufficiently impeached so that no adjustment was awarded. Only one circuit has found the fact-finding required by *Delaware Valley II* to be too difficult to adhere to; yet previous panels in that Circuit correctly applied *Delaware Valley II*. *Compare King v. Palmer*, 950 F.2d 771 (D.C. Cir. 1991) *with McKenzie v. Kennickell*, 875 F.2d 330 (D.C. Cir. 1989).

The Third Circuit follows Justice O'Connor's test, and recognizes that contingency is to be treated on a class basis. That circuit also rejected the notion that econometric studies to quantify the market are required, although it has noted that conclusory affidavits, without sufficient factual foundation, are not sufficient. *Blum v. Witco Chem. Corp.*, 888 F.2d 975, 983 n.2 (3d Cir. 1989) ("*Blum II*"). *See also Vargas v. Calabrese*, 750 F. Supp. 677 (D.N.J. 1990).[22]

The Fourth Circuit also follows Justice O'Connor's test in resolving requests for contingency adjustments. *Spell v. McDaniel*, 824 F.2d 1380, 1403-05 (4th Cir. 1987). Enhancements have not necessarily been awarded in all cases. Rather, where defendants demonstrate that there is an ample supply of attorneys willing to prosecute contingent cases without an upward adjustment, contingency enhancements have been denied. *See Duke v. Uniroyal, Inc.*, 743 F. Supp. 1218,

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[22] Thus, *Blum II* clarified earlier Third Circuit decisions. *See Blum v. Witco Chem. Corp.*, 829 F.2d 367, 380 (3d Cir. 1987) (*Blum I*) (requesting "expert testimony from someone familiar with the economics of the legal profession.") and *Student Public Interest Research Group v. AT&T Bell Laboratories*, 842 F.2d 1436, 1452 (3d Cir. 1988).

1226 (E.D.N.C. 1990), *aff'd in part and rev'd in part on other grounds*, 928 F.2d 1413 (4th Cir. 1991).

Before the Fifth Circuit will approve a contingency enhancement, there must be evidence in the record and specific findings by the trial court justifying the conclusion that contingency cases are compensated more highly in the private market than other cases and that enhancements are necessary to induce competent counsel to take such cases. *Leroy v. City of Houston*, 831 F.2d 576 (5th Cir. 1987), *cert. denied*, 486 U.S. 1008 (1988). In reversing and remanding a district court's denial of a contingency premium for failure to make proper findings, the Fifth Circuit stated:

> Justice O'Connor's instructions in *Delaware Valley II* are explicit: the district court must consider whether a contingency enhancement would have been necessary to induce competent counsel to accept such cases at the time the case was undertaken and whether contingency cases as a class were treated differently from noncontingency cases.

Islamic Center of Mississippi Inc. v. Starkville, 876 F.2d 465, 472 (5th Cir. 1989).

Similarly, the Sixth Circuit, applying Justice O'Connor's test, remanded a district court's award of a contingency enhancement because the court did not make specific findings of fact as to the amount and necessity of a risk adjustment. *Conklin v. Lovely*, 834 F.2d 543, 553-54 (6th Cir. 1987).

The Seventh Circuit has clearly adopted Justice O'Connor's test for awarding contingent risk enhancements in cases where the evidence shows that, without the enhancement, plaintiffs would have faced substantial difficulties in finding counsel in the local or other relevant market and that the relevant market compensates for contingent risk. *King v. Board of Regents*, 748 F. Supp. 686, 692-93 (E.D. Wis. 1990).[23] On the other hand, the district courts have not

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[23] *See also, Skelton v. General Motors Corp.*, 860 F.2d 250, 254 n. 3 (7th Cir. 1988), *cert. denied*, 493 U.S. 810 (1989); *Soto v. Adams Elevator Equip. Co.*, 941 F.2d 543, 553 (7th Cir. 1991).

awarded contingency adjustments where the evidence was insufficient to satisfy the *Delaware Valley II* test. *Wolf v. Planned Property Management*, 735 F. Supp. 882, 887 (N.D. Ill. 1990); *Leigh v. Engle*, 714 F. Supp. 1465, 1475-76 (N.D. Ill. 1989).

The Eighth Circuit recently found that a plaintiff met the *Delaware Valley II* test based on "undisputed evidence" that very few attorneys were available to prosecute employment discrimination and civil rights cases in the St. Louis Metropolitan area and that a contingency enhancement was necessary to attract counsel to such cases. *Morris v. American Nat'l Can Corp.*, 952 F.2d 200, 205-07 (8th Cir. 1991). However, in cases where the record failed to establish that the unavailability of a risk enhancement would have caused plaintiff substantial difficulty in locating competent counsel, the Eighth Circuit has denied a contingency enhancement. *Hendrickson v. Branstad*, 934 F.2d 158, 163 (8th Cir. 1991).

The Ninth Circuit has applied the *Delaware Valley II* test correctly in a variety of cases. In *Fadhl v. City of San Francisco*, 859 F.2d 649 (9th Cir. 1988), the Ninth Circuit affirmed a contingency enhancement based on uncontradicted testimony that the legal marketplace, defined as Title VII cases in the San Francisco Bay Area, required an enhancement for attorneys to accept such cases on a contingent fee basis. *Id.* at 650-51. Likewise, in *Hasbrouck v. Texaco, Inc.*, 879 F.2d 632 (9th Cir. 1989), an antitrust case, the Ninth Circuit affirmed a contingency enhancement under the *Delaware Valley II* test, based on uncontradicted testimony from antitrust counsel. *Id.* at 637. *See also D'Emanuele v. Montgomery Ward & Co.*, 904 F.2d 1379 (9th Cir. 1990).

The Tenth Circuit, in *Smith v. Freeman*, 921 F.2d 1120, 1123 (10th Cir. 1990) refused to establish a *per se* rule requiring an enhancement in contingent cases. The Tenth Circuit has further directed its district courts to make specific findings of fact, pursuant to *Delaware Valley II* requirements,

before they conclude that a class of contingency cases requires upward adjustment of the lodestar. *Wulf v. City of Wichita*, 883 F.2d 842, 876 (10th Cir. 1989).

The Eleventh Circuit also holds that the propriety of contingency enhancements is governed by Justice O'Connor's test and has affirmed enhancements where the evidence demonstrates their necessity. *Curry v. Contract Fabricators Profit Sharing Plan*, 744 F.Supp. 1061, 1073 (M.D. Ala. 1988), *aff'd*, 891 F.2d 842, 850 (11th Cir. 1990); *Martin v. Univ. of South Alabama*, 911 F.2d 604, 611 (11th Cir. 1990). In *Norman v. Housing Auth.*, 836 F.2d 1292 (11th Cir. 1988), the Eleventh Circuit upheld the denial of contingency risk enhancement, finding that "the record is absolutely devoid of any evidence that would suggest that enhancement over the rates requested is necessary to attract competent counsel into the field." *Id.*, at 1302, 1306.

Thus, almost without exception, the circuits have understood and followed the market test set forth by Justice O'Connor in *Delaware Valley II*, have required specific evidence to meet the test, and have demonstrated no more difficulty discerning the market treatment of contingency than the courts have in determining market-based hourly rates for attorneys of comparable skill and experience or determining how the relevant market compensates paralegals and law clerks.[24] Claims by the City and *amici* that Justice O'Connor's concurrence has proven to be "unworkable" stand without empirical support.

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[24] Congress, of course, invested the federal courts with far more complicated evaluations of market conditions in antitrust and securities cases. E. Cavanagh, *Attorney's Fees in Antitrust Litigation: Making the System Fairer*, 57 Fordham L. Rev. 51, 70-71 (1988). No one is suggesting that evaluating market treatment of rates, paralegals, and contingent risk presents even a shadow of the complexity of such cases.

B. As With Other Economic Markets, the Legal Marketplace Normally Provides a Risk Premium For Cases Taken on a Contingency-Fee Basis

1. Contingency Fee Cases Normally Command Higher Fees than Fees for Work on Noncontingency Matters

It is not surprising that most courts have determined that the legal marketplace compensates contingency-fee cases differently than hourly rate representation. In calculating the initial lodestar, most courts employ an hourly rate that is comparable to what is reasonably charged by attorneys with similar skills and experience for *noncontingent* matters. *See, e.g., Lindy Bros. Builders, Inc. v. Am. Radiator, Etc.*, 540 F.2d 102, 117 (3d Cir. 1976); *Hidle v. Geneva County Bd. of Educ.*, 681 F.Supp. 752, 755 (M.D. Ala. 1988); *In re Wicat Securities Litigation*, 671 F.Supp. 726, 732-34 (D. Utah 1987). That rate alone may not adequately compensate the attorney who accepts a case on the condition that he or she receive no payment for a losing effort.

> A contingent fee must be higher than a fee for the same legal services paid as they are performed. The contingent fee compensates the lawyer not only for the legal services he renders but for the loan of those services. The interest rate on such a loan is high because the risk of default (the loss of the case, which cancels the debt of the client to the lawyer) is so much higher than that of conventional loans. . . .

R. Posner, *Economic Analysis of Law* 534 (3d ed. 1986). It is this distinction between contingency rates and non-contingency rates that may, where the market so demands, provide a basis for an "upward adjustment" of, or a "risk premium" over, the lodestar calculation. *See also* Affidavit of Richard Posner ("[a]n award limited to normal time charges [in an antitrust case] would, in my judgment, typically undercompensate the lawyers for the Class") at 00244; Affidavit of

Frank Easterbrook and Robert Sherwin (under the "market value approach to the calculation of fees" in civil rights cases, the value of the attorneys services may depend "on how the client promises to compensate the lawyer") at D-4.[25]

2. Contingency Enhancements in the Legal Marketplace Find Well-Established Parallels in Modern Economic Theory Regarding How Markets Operate

The "contingency adjustment" at issue before the Court is simply a specific example of a core economic principle called "risk premium." The concept of a risk premium to provide incentives to invest in more risky enterprises has existed since Adam Smith wrote *The Wealth of Nations*,[26] and continues to provide vitality to well-accepted principles in modern economic theory.[27]

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[25] These affidavits are in the materials Respondents lodged with the Court.

[26] In 1776, Smith discussed the relationship between the risk in succeeding in any particular profession and the market wages paid to that profession. Indeed, in discussing the risks inherent in the legal profession, Smith suggested that a 20-to-1 enhancement over wages paid to more secure enterprises would be appropriate.

> How extravagant soever the fees of counselors at law may sometimes appear, their real retribution is never equal to this. . . . The lottery of the law, therefore, is very far from being a perfectly fair lottery; and that, as well as many other liberal and honourable professions, are, in point of pecuniary gain, evidently under-recompenced.

Adam Smith, *The Nature and Causes of the Wealth of Nations* 106 (Modern Library ed. 1937).

[27] The concept of the risk premium in accepted modern economic theory is most recently embodied in the works of economist William Sharpe, who won the 1990 Nobel Prize for his work on the "Capital Asset Pricing Model." *See* W. Sharpe, "*Capital Asset Prices With and Without Negative Holdings*" 46 Journal of Finance 489 (1991).

Today's economic literature exploring various aspects of labor and investment markets[28] regularly refer to and accept the well-established concept of the risk premium. The market will frequently reflect a higher rate of return for an uncertain enterprise or investment over a safe one.

3. Court-Awarded Contingency Enhancements are Nothing More Than the Minimum Risk Premium Required by the Legal Marketplace to Attract Counsel to Fee-Shifting Cases

Enhancements of fee awards by district courts under the typical fee-shifting statute simply reflect that, in some markets, a premium over normal noncontingent hourly rates may be required to attract competent counsel. Rather than being a "windfall for attorneys" above and beyond what is already a "reasonable attorney's fee," the contingency enhancement is a potential risk premium which the market may determine to be part of the reasonable fee. An award that fails to include a risk premium for a contingent case is not a reasonable fee, if the market compensates for this risk.

Amici contend that a contingency enhancement is not necessary because: (1) attorneys may bargain for a percentage of plaintiffs' damage recovery; (2) representation may be

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[28] *See, e.g.*, R. Evans & R. Weinstein, *Ranking Occupations as Risky Income Prospects*, 35 Indus. & Lab. Rel. Rev. 252 (1982); A.G. King, *Occupational Choice, Risk Aversion, and Wealth*, 27 Indus. & Lab. Rel. Rev. 586 (1972); R. Posner, *Economic Analysis of Law*, at 405-410. *See also* R. Posner, *Law and the Theory of Finance: Some Intersections* 54 Geo. Wash. L. Rev. 159, 161 n.5 (1986) ("The higher expected return for riskier investments is a central empirical finding in the finance literature") (citations omitted). One would never expect the market to reflect the value of a Federal Treasury Bill to be the same for volatile common stocks. If the expected returns were the same, no investor would purchase the stocks with their concomitant risk of loss. Thus, the risk premium is the price that the market uses to call forth an adequate supply of investors to undertake riskier investments.

secured through voluntary or *pro bono* efforts; or (3) liability is sometimes a sure thing. The last argument is simply a claim that, in certain classes of cases, there is no risk in assuming a contingent case. If this is so, the plaintiff will be unable to prove that the market in that type of litigation commands a premium for the contingent case, and no premium will be awarded.

Contentions (1) and (2), however, simply reject the market-based approach to determining a reasonable attorneys' fee. The use of percentage recovery or *pro bono* efforts to provide representation to plaintiffs in certain types of litigation, as well as compelling counsel to represent unpopular clients, are *alternatives* to the fee-shifting statutes, alternatives of which Congress was clearly aware when it passed the fee-shifting provisions. *See* note 13 *supra*. In no way does the availability of some limited representation through other means diminish the fact that, in many legal marketplaces, a risk enhancer is necessary to attract competent counsel.[29]

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[29] The Solicitor General also contends that a sufficient number of unemployed or underemployed attorneys are available to prosecute federal fee-shifting cases, and that no risk enhancement is therefore necessary. There is no evidence in the legislative history that Congress intended that important federal policies be enforced primarily by unemployed or underemployed attorneys. Effective enforcement requires providing plaintiffs with lawyers comparable in quality to those representing defendants. Moreover, justifying a "public interest discount" on the ground that some attorneys may have charitable intentions "invokes the interests of the disadvantaged to justify a policy contrary to their interests." S. Berger, 126 U. Pa. L. Rev. at 312.

> The "public interest discount" suffers from yet another faulty premise. Statutory fee provisions are not enacted for the benefit of lawyers; rather, they are enacted for the benefit of the class of persons protected by the statutes. *Reducing the fees awarded on the ground that lawyers should be inspired by their sense of civic responsibility reduces the economic*

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C. The City and Amici Seek a Radical Departure from Basic Marketplace Principles

The City and *amici* do not dispute the marketplace basis of this Court's prior fees decisions. In fact, they acknowledge it. *See* Wash. Legal Found.'s Brief at 8-9: "All nine justices [in *Delaware Valley II*] appear to [agree] that any contingency enhancement should focus primarily on market-wide conditions. . . . " Moreover, the City and *amici* do not dispute the applicability of legal marketplace practices with regard to reasonable hourly rates, reasonable number of hours, and compensation for paralegals. Despite these admissions, they turn their backs on market practices regarding contingent risk. This *selective* acceptance of market treatment of reasonableness is contradicted by this Court's fees jurisprudence, the text of fee-shifting statutes, and legislative history regarding reasonable fees. *See*, Sections I, II.A and II.B, *supra*.

The City, with no supporting evidence, ignores market practices regarding contingent risk and baldly asserts that the reasonable hourly rate used in the lodestar calculation "necessarily reflects contingency considerations." Pet. Brief at 18. Nowhere does the City explain how a market hourly rate includes a contingency adjustment. *See* p. 23, *supra*.

The difference between an hourly rate and contingent fee engagement can be illustrated as follows. In one case, an attorney is hired at his or her normal hourly rate. The client agrees to pay hourly fees and all costs, including litigation expenses as billed on a monthly basis, win, lose or draw. The attorney receives payment on a monthly basis for 3,000 hours of time over a seven year period; the client also pays $80,000 in costs and expert fees.

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> *attractiveness of such cases, thereby restricting the supply of legal resources made available. . . .*

Id. at 312-315 (emphasis added).

In another case, an attorney receives no payment for seven years, during which time 3,000 hours and $80,000 in costs and expert fees are expended. The attorney has a right to be paid only if he or she prevails in the case. A losing case will cost the attorney the value of the time and expenses, because the client is incapable of paying costs. The case is successful; the client prevails. The client, however, does not meekly pay the attorney's bill after seven years of work. Instead, the client disputes nearly all parts of the attorney's fee and cost bill, and the attorney is forced to file a motion with the court, and defend an appeal, in order to be paid for the work and the underlying costs. The attorney earns no interest on the $80,000 advanced for costs.

The same fee would not be reasonable in both cases, nor would the legal marketplace treat these two types of representation the same. The City and *amici* would, however, treat them the same and would prohibit the courts from considering any evidence from the legal market. They fail to explain, however, why evidence of relevant market practices should be ignored or why market practices properly can be relied on to calculate a "reasonable" lodestar fee, but not a contingency adjustment.

D. The Objections Made by The City and *Amici* Regarding the Need for and Operation of the Contingency Risk Factor Are Addressed by Justice O'Connor's Two-Prong Test

Many of the City and *amici*'s objections to Justice O'Connor's test have been addressed. The remainder, addressed here, misunderstand her test, exaggerate the concerns or are otherwise without merit.

First, the Solicitor General contends that the class-based market test fails to identify the "relevant market." This alleged "difficulty," however, is no different than the inquiry undertaken in connection with lodestar hourly rates, which requires courts to determine the market rate for the particular

type of case and geographic area. That relevant market analysis is properly left open for district courts. *See* H. Newberg, *Attorney Fee Awards* §4.14, at 142 (1986) ("*Blum* deliberately adopted a flexible, undefined relevant community standard that leaves room for courts to adopt different geographical and litigation specialty approaches that best suit the particular circumstances involved"). *See also* Section III.E *infra*.

The Solicitor General next argues that Justice O'Connor's test is "unworkable" because (1) there is no incentive to control the size of the fee, and (2) if enhancements are "routinely" awarded, attorneys would decline to accept cases on a guaranteed, hourly rate basis. Again, Justice O'Connor's test addresses these concerns. If the attorney declined representation on a guaranteed, hourly rate basis, that attorney would not satisfy the test and obtain an enhancement.[30] If the attorney billed more than a reasonable *number* of hours, this would be reduced as part of the lodestar calculation. Likewise, whether any particular hourly rate is discounted for "billing judgment" or poor results is again a market-based lodestar determination.[31]

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[30] The American Bar Association's Standing Committee on Ethics and Professional Responsibility considers an attorney's failure to offer a client an hourly rate contract before accepting a case on a contingent-fee basis to be a violation of professional ethics. ABA Standing Committee on Ethics and Professional Responsibility Informal Opinion, 86-1521 "Offering Alternatives to Contingent Fees" (1986).

[31] The notion that the contingent fee attorney has an incentive to unnecessarily increase hours defies common sense. The risk of receiving no compensation is enough incentive to expend only those hours reasonably necessary to win the case. *See Stanford Daily v. Zurcher*, 64 F.R.D. 680, 683 (N.D. Cal. 1974) ("plaintiffs' attorneys, who had no assurance that attorneys' fees would eventually be granted, had incentive to minimize rather than maximize the amount of time spent on the case"). Moreover, an increased expenditure of time will not decrease the risk inherent in a class of litigation. By analogy, if an investor is offered an investment stock that has a 50% chance of an attractive return and a 50%

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The Solicitor General also argues that Justice O'Connor's test requires a "particularized" factual inquiry into the individual plaintiff's "actual difficulties" in retaining counsel rather than the general shortage of attorneys for types of cases. In the next breath, he acknowledges that the O'Connor concurrence expressly prohibits the particularized assessment of risk. In fact, the courts correctly have focused on the general dearth of counsel for certain types of cases, not the difficulty any particular plaintiff had in finding counsel. *See, e.g., Morris v. American Can Corp.*, 952 F.2d 200, 205 (1991); *Spell v. McDaniel*, 824 F.2d at 1405; *Hidle v. Geneva County Bd. of Educ.*, 681 F.Supp. 752, 751-58 (M.D. Ala. 1988). Moreover, all nine justices in *Delaware Valley II* rejected a particularized inquiry. *See* pp. 12-13, above.

The Solicitor General then claims that Justice O'Connor's test is "unworkable" because it relies on "self-serving" affidavits. Affidavits in support of – or in opposition to – contingency adjustments are no more "self-serving" than affidavits regarding reasonable hourly rates, the reasonable number of hours, the quality of legal representation, or the "exceptional success" of the results achieved. If any particular testimony is biased, or without proper foundation, defendants can point that out and/or submit counter-evidence. The trial courts can be relied upon to separate the real from the imagined. Indeed, as this Court has stated, the district courts

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chance of total loss, he or she may be willing to purchase 50 or 100 shares, but will hardly be willing to risk all of his or her assets in that same stock. And, regardless of the size of the investment, the 50-50 risk always remains the same. Thus, while the attorney who is paid for all hours worked, win or lose, may have an incentive to increase the hours billed, an attorney paid on a contingent basis (and who will have to run the gauntlet of a federal court fee application) will have every incentive to moderate the time/cost investment, due to the uncertainty of payment.

have "superior understanding" of such factual matters.[32] *Hensley*, 461 U.S. at 437.

The Washington Legal Foundation claims that Justice O'Connor's test would defeat the "rare and exceptional circumstances" rule. No Supreme Court case, including *Delaware Valley II*, has applied the "rare and exceptional" test to contingency adjustments. Were contingency adjustments available only in "rare and exceptional" cases, it would be contrary to legal marketplace treatment of risk, and would *require* a particularized, *post-hoc* analysis to determine if the risk undertaken in that case greatly exceeded normal risk levels.

This *amicus* argues that accounting for contingent risk will result in "nonmeritorious civil rights and environmental law complaints." Wash. Legal Found.'s Brief at 18. Congress responded to this concern by providing fees for prevailing defendants where the case was "frivolous, unreasonable, or without foundation," *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978), not by limiting the calculation of an otherwise reasonable fee as it has done in numerous other statutes. *See* Section II.A.

The *amicus* further contends that if contingency can be reflected in a fee, "[t]here is no limiting principle" on contingency adjustments. That obviously has not happened under *Delaware Valley II*. *See* Section III.A. Moreover, it could not

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[32] The level of proof of unavailability of counsel required in *Department of Labor v. Triplett*, 494 U.S. 715 (1990), is not applicable here. In *Triplett*, the anecdotal evidence submitted sought to attack the constitutionality of the implementation of the Black Lung Benefit Act, 30 U.S.C. §§901 et. seq. This Court noted "the heavy presumption of constitutionality" and held, as it had in *Walters v. National Assn. of Radiation Survivors*, 473 U.S. 305 (1985), that anyone challenging the law on constitutional grounds had to make "an extraordinarily strong showing . . . to warrant a holding that the fee limitation denies claimants due process of law." *Triplett*, 494 U.S. at 722.

happen. The "limiting principle" of the O'Connor concurrence is the class-based assessment of risk and the directive that any contingency enhancement be no "more than necessary to bring the fee within the range that would attract competent counsel." *Delaware Valley II*, at 733.

E. Determination of the Appropriate Market-Based Contingency Adjustment is a Judicial, Not Legislative, Task

The Solicitor General and the District of Columbia suggest that Congress should sit as a legislative price control board that directs the appropriate payment for legal services on a nationwide basis. Solicitor General's Brief at 25-26; District of Columbia's Brief at 24-26. These *amici* assert that Congress is better able to direct a fair payment for legal work involving compensation for risk than the courts are able to evaluate how the free market compensates such work, despite this Court's emphasis that the district court has "superior understanding" of such factual matters. *Hensley*, 461 U.S. at 437.

The short answer is that when Congress decides to intervene with the market and set the level of attorney compensation, it says so in the statute. *See supra* at pp. 17-19. However, where Congress *does not* impose such restrictions, it relies upon the courts to evaluate the operation of the legal marketplace. The market for legal services is not monolithic: it is not a uniform, national market that applies in the same manner to all the various types of cases brought pursuant to statutes that contain fees provisions. Nor is the free market static. District courts are well suited to making specific fact-finding decisions about the operation of the legal market at specific locations and at particular times with respect to a certain type of case, just as courts are relied upon to make other complex decisions regarding the market. *See* note 24, *supra*.

The courts make these kinds of findings regarding hourly rates and other matters related to the determination of the lodestar. The City and *amici* do not, and cannot, contest this.

There is no basis for concluding that courts are able to determine some aspects of the market, but not the market for risk compensation.

IV.

THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT AWARDED AN ENHANCEMENT OF THE LODESTAR FEE BASED UPON CONTINGENT RISK

The district court properly held that a "reasonable attorney's fee" under the applicable federal fee-shifting statutes may include an enhancement of the lodestar fee to compensate for contingent risk. App. I at 130-33. Based on the evidence submitted, the district court found that the Dagues were entitled to a 25% contingent risk enhancement. App. I at 133. The Second Circuit agreed with the district court's determination that contingent risk may be taken into account in calculating a reasonable attorney's fee. App. I at 35-37. It concluded that the district court's award of a 25% enhancement was supported by its findings and affirmed it. App. I at 34-37. Because it was within the authority of the lower court to adjust the lodestar fee to compensate for contingent risk, the district court's ruling should be affirmed.

The City criticizes the adequacy of the affidavits the Dagues submitted to support their enhancement request. However, the City did not raise the sufficiency of the evidence supporting the fee enhancement in its appeal to the Second Circuit nor in its petition for *certiorari*. Moreover, this Court's grant of *certiorari* does not encompass this inquiry. The Court's order granting *certiorari* is limited to the issue of whether a court may, in determining a reasonable attorney's fee under the environmental statutes, enhance the lodestar fee to account for contingent risk.[33]

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[33] The City urges this Court to remand the fee award to the district court not only to vacate the risk enhancement but also to reduce the

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Even if the issue were properly before this Court, this Court need not, and indeed should not, address it. Instead, the case should be remanded to the district court for reconsideration of the risk enhancement calculation, consistent with Justice O'Connor's test. As discussed in Section III.E, *supra*, the district court is keenly familiar with the facts relevant to the inquiry. It is in the best position to evaluate the unique evidence of the local Burlington legal market's treatment of contingent risk and the availability of counsel to take complex cases such as this one.

CONCLUSION

Respondents request that this Court affirm the fee enhancement for contingent risk awarded by the district court.

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lodestar figure. Pet. Brief at 24-26. The City argues that the results obtained in the litigation were limited and do not justify the lodestar amount, citing *Hensley*, 461 U.S. at 429. The district court rejected this same argument below, as did the Second Circuit. As stated above, *certiorari* was granted only on the issue of the availability of contingent risk enhancements. Accordingly, the issue of the propriety of the lodestar figure under *Hensley* is not before this Court.